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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 366

THE PHILIP CAREY MANUFACTURING COMPANY,
(MIAMI CABINET DIVISION),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN B. HOLLISTER
603 Dixie Terminal Building
Cincinnati 2, Ohio
Attorney for Petitioner

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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NATIONAL LABOR RELATIONS BOARD, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Sixth Circuit insofar as it orders enforcement against the Petitioner of portions of an order of the National Labor Relations Board issued by the Board on February 6, 1963 in Cases Nos. 9-CA-2192 and 9-CA-2240.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (JA 3a-11a; the designation "J.A." refers to the Joint Appendix containing the record in the court below), including the Intermediate Report of the Trial Examiner (JA 11a-72a), and the order correcting decision and order

(JA 72aa-72ad) is reported at 140 NLRB 1103. The opinion of the Court of Appeals (Appendix A, *infra*, pages 1a-32a) is reported at 331 F. (2d) 720.

Petitions for rehearing filed by the National Labor Relations Board and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO and its Local Union No. 689 were denied by the court below on May 5 and May 13, 1964. ... F. (2d) ...

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sections 10(e) and (f) of the National Labor Relations Act, as amended.

The judgment of the Court of Appeals was entered on March 31, 1964. On June 26, 1964, Mr. Justice Potter Stewart extended the time for filing this Petition for a Writ of Certiorari to and including August 11, 1964.

QUESTION PRESENTED

Whether the National Labor Relations Board violated Section 10(b) of the Act (29 U.S.C. § 160(b)) by issuing its complaint and decision and order against the Petitioner.

STATUTE INVOLVED

The relevant statute, Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set forth in Appendix B, *infra*, page 1b.

STATEMENT OF THE CASE

The Board and the court below found that the Petitioner had violated the National Labor Relations Act, as amended, in two respects: (1) the petitioning Employer insisted

"to impasse on December 28 [1960] upon its superseniority proposal," and this insistence prolonged the strike which the Union had called against the Petitioner (JA 6a-7a; App. A, *infra* 16a); and (2) the Petitioner denied reinstatement to certain replaced strikers when they applied for reinstatement in August, 1961. (JA 7a-8a; App. A, *infra*, 16a)

No complaint was ever issued by the Board alleging the first of the above two violations, and this asserted misconduct by the Petitioner was never the subject of a charge filed at any time by anyone in this proceeding. The second of the above violations was first alleged in an amendment to the complaint filed at the beginning of the hearing on October 3, 1961, and was an outgrowth of a "Further Amended Charge" filed on September 12, 1961. (JA 667a-668a; Gen. Counsel's Ex. No. 1(i); JA 643a-651a) This second violation was "based upon" the first violation referred to above, which occurred more than six months before the "Further Amended Charge" was filed. Accordingly, the Petitioner has consistently contended before both the Board and the Court of Appeals that Section 10(b) of the Act has been violated in this case and that enforcement of the Board's order in its entirety must be denied.

The complaint and order consolidating cases was issued on July 28, 1961. (General Counsel's Ex. 1-K; JA 653a-661a) As stated above, the complaint contained no reference to the events of December 28, 1960, which the Board subsequently found to have violated Section 8(a)(5) of the Act, converting the strike from an economic strike to an unfair labor practice strike. The complaint was based on a second amended charge which had been filed in Case No. 9-CA-2192 on October 20, 1960. (JA 636a-637a) This charge alleged in substance as follows:

(1) The Employer refused to bargain in good faith by proposing and insisting on contract terms "which in effect

did withdraw employees benefits which had at all times been enjoyed by the Employer's employees prior to the certification of the UAW-AFL-CIO as these employees bargaining agent." The complaint interpreted and elaborated on these allegations by alleging that on July 26 and 28, 1960, the Employer made proposals to the Union which "withdrew certain benefits the employees enjoyed including the six month seniority accumulation on layoff and the retention of a higher wage rate on transfer to a job with a lower wage rate" and "which provided for reduced wages in a number of classifications." (Complaint, Sections 5(a), (b); JA 655a-656a) It was also alleged that on September 26, 1960, by letter, the Employer withdrew its proposal for check-off of Union dues and the proposed effective date of a contract (Section 5(c); JA 656a), and that on September 14, 1960, the Employer stopped making payments on behalf of employees to the contributory insurance plan. (Section 5(f); Appendix C, *infra*, 35a)

The Trial Examiner, with Board approval, found against the General Counsel with respect to most of these items, and the Board threw out the rest of this portion of the complaint. The Board specifically found that "the strike which began on September 6, 1960, was an economic strike in its inception." (JA 5a)

(2) It was alleged also that the Employer sent a letter on September 26, 1960, to its employees threatening "permanent replacement of the striking employees and withdrawing certain agreements which had been agreed upon during the course of the bargaining negotiations." (JA 682a) It was alleged that by these and other acts, the Employer had not bargained in good faith, in violation of Section 8(a)(5) of the Act. The Trial Examiner, with Board approval, expressly rejected the portion of the charge relating to the letter of September 26, 1960 (JA

682a), and held that the letter did not constitute a violation of the Act. (JA 51a)

On December 7, 1960, a new charge was filed in Case No. 9-CA-2240. (JA 640a-641a) This charge alleged that on and after November 22, 1960, the Employer refused to bargain in good faith by refusing to furnish area wage information to the Union and failing to grant striking Union members vacation pay. The allegations of this charge were dismissed by the Regional Director on January 12, 1961. (App. C, *infra*, 35a)

On July 28, 1961, the Regional Director of the Board issued the order consolidating Cases No. 9-CA-2192 and 9-CA-2240 although the latter had been previously dismissed and the aforementioned complaint issued on the same date did not include any of the allegations on which Case No. 9-CA-2240 was based. (JA 653a)

On September 12, 1961, as stated above, a "Further Amended Charge" was filed against the Employer (JA 643a-651a) and became the basis of a "Motion to Amend Complaint" dated October 3, 1961 (JA 667a), which was subsequently granted by the Trial Examiner. This case has been tried on the complaint as so amended.

The "Further Amended Charge" of September 12, 1961 was filed more than six months after the crucial events of December 28, 1960, and made no reference to the alleged impasse of December 28, 1960. The aforementioned amendment to the complaint, dated October 3, 1961, based on the "Further Amended Charge" of September 12, 1961, likewise made no reference to the events of December 28, 1960, and did not purport to allege that the Petitioner had violated the law by bargaining a proposal to an impasse which prolonged the strike.

In addition to the facts that no complaint was ever issued referring to the events of December 28, 1960, or purporting to allege that the Petitioner had violated the law by

bargaining a proposal to an impasse which prolonged the strike, and that no charge was ever filed within six months after such events, it was also undisputed in the record that the Union and replaced strikers were notified in writing by the Petitioner on November 25, 1960 (JA 716a, 719a) and February 8, 1961 (JA 720a) that they had been permanently replaced, and that they failed to file a charge within six months after such notification.

The Trial Examiner, with Board approval, concluded that the requirements of Section 10(b) of the Act were satisfied by the fact that charges had been filed against the Petitioner *before* the critical date of December 28, 1960, and that this met the requirement of the Act that charges must be filed within six months *after* violation. (JA 12a-16a) He also concluded that:

> ". . . the violation alleged is not replacement of the strikers, which is not in itself unlawful, but the refusal to reinstate them upon application, which did not occur until August 1961, and it is therefore from that date that the 6-month period of limitations in Section 10(b) runs. It follows that the September 1961 amendment to the charges was timely, even if it did not relate back to any prior date." (JA 13a)

Upon review, the Court of Appeals for the Sixth Circuit split 2 to 1 on the Section 10(b) issue. Two of the judges, relying upon the decision of this Court in *NLRB* v. *Fant Milling Co.* (1959) 360 U.S. 301; 3 L.E. (2d) 1243, and the decision of the Court of Appeals for the Eighth Circuit in *NLRB* v. *Brown and Root, Inc.* (CA 8; 1953) 203 F. (2d) 139, 146, agreed with the Board and the Trial Examiner that Section 10(b) had not been violated. (App. A, *infra*, 20a-23a) The other judge, differing in his interpretation of *NLRB* v. *Fant Milling Co.*, *supra*, and relying upon the decision of the Court of Appeals for the Fifth

Circuit in *NLRB* v. *Greenville Cotton Oil Co.* (CA 5; 1952) 197 F. (2d) 326 concluded that "any charge based on the December 28, 1960 unfair labor practice is barred by § 10(b) of the Act." (App. A, *infra*, 32a)

REASONS FOR GRANTING THE WRIT

The decision below is "based upon" an unfair labor practice "occurring more than six months prior to the filing of the charge with the Board," in violation of Section 10(b) of the Act as interpreted by this Court.

Section 10(b) of the Act, in its material part, states that ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." Thus, the statute requires (a) a charge, (b) "based upon" an unfair labor practice, and (c) which was committed not more than six months before the filing of the charge.

1. The Decision Conflicts with the BRYAN Decision of This Court.

The court below concluded that "the refusal to reinstate occurred in August, and the charge so alleging was filed in September and therefore was timely." (App. A, *infra*, page 23a) The charge referred to by the court, in affirming the decision of the Board, was the "Further Amended Charge" filed against the Petitioner on September 12, 1961. (JA 643a-651a) It alleged in substance that on or about August 3 and August 9, 1961:

> ". . . the above-named Employer, by its officers, agents and representatives, refused and failed to employ and/or reinstate the employees, unfair labor practice strikers, . . . all of which employees on or about said dates respectively did apply for employment and/or reinstatement, because of their membership in and activities on behalf of" the Union "because they engaged in concerted activities with other employees of

> said Employer for the purpose of collective bargaining and other mutual aid and protection, and did discriminate in regard to the hire and tenure of employment of said employees in order to discourage membership in said labor organizations."

It was further charged that in August, the Petitioner notified the Union in writing "that all strikers who are not reinstated were 'no longer employees of this company'" and that, "We do not consider that replaced strikers are still employees of this company. . . ." (JA 647a-648a)

It is elementary, however, that the refusal to reinstate a replaced striker upon request is not unlawful if the strike, at the time of the application for reinstatement, is an economic one. *NLRB* v. *Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333; 82 L.E. 1381. The Board has expressly found, in the instant case, "that the strike which began on September 6, 1960, was an economic strike in its inception." The Board has also found that the strike "was converted to [an unfair labor practice strike] as of December 28 by the Respondent's conduct after the strike began." (JA 5a)

In the so-called *Bryan* case, *Local Lodge No. 1424* v. *NLRB* (1960), 362 U.S. 411, 422; 4 L.E. (2d) 832, this Court expressly held that:

> ". . . *a finding of violation which is inescapably grounded on events pre-dating the limitations period is directly at odds with the purposes of the 10(b) proviso.*" (Emphasis added)

The finding of the Board and the court below that the Petitioner violated the Act when it denied reinstatement to replaced strikers in August 1961 was "inescapably grounded" on events which occurred on December 28, 1960 —"events pre-dating the limitations period" of six months specified in Section 10(b) of the Act, which were found to have converted the strike from an economic strike to an

unfair labor practice strike. The charge relied upon by the Board and the court below, which was filed on September 12, 1961, could not properly be the basis of either a complaint or a Board decision "grounded on events" occurring more than six months before September 12, 1961, to-wit, before March 12, 1961. The Petitioner's denial of the August 1961 requests for reinstatement was found to be unlawful solely because of the events which occurred on December 28, 1960, which, it was found, converted the Union's economic strike, as of that date, into an unfair labor practice strike.

In their decision below, the two judges who found that the requirements of Section 10(b) had been satisfied simply ignored the *Bryan* decision of this Court. Acting Chief Judge O'Sullivan, who dissented, relied upon the *Bryan* decision. In his opinion, he stated:

> "In our case there was nothing to prevent the employees' union, which was quite active in this regard during the strike, to have made a timely charge that respondent's December 28, 1960 conduct was an unfair labor practice. Such charge would have tolled the statute and would permit a complaint 'based upon' it to be issued should respondents thereafter deny reinstatement to strikers replaced after the strike had become an unfair labor practice strike. The majority holding would expose an employer to the sanctions imposed for unfair labor practice no matter how long after their occurrence the offended employees wait to make a charge and seek a remedy. I believe that the language of the United States Supreme Court in *Machinists Local* v. *NLRB*, 362 U.S. 411 (*Bryan* case) supports my view. The court there said:
>
> > '[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso.' 362 U.S. 422." (App. A, *infra*, pages 31a-32a)

2. There Is a Conflict Among the Fifth, Sixth and Eighth Circuits.

There is a conflict among the Circuits, as well as within the Sixth Circuit on this important 10(b) issue. The decision of the Fifth Circuit in *NLRB* v. *Greenville Cotton Oil Co., supra,* supports the Petitioner's construction of Section 10(b). In *Brown and Root, Inc.* (1952) 99 NLRB 1031; enf. in part, rev. in part (CA 8; 1953) 203 F. (2d) 139; rehearing den. (CA 8; 1953) 206 F. (2d) 73; order qualified (CA 8; 1963) 311 F. (2d) 447, the Court of Appeals for the Eighth Circuit appears to have arrived at a contrary construction.

Greenville Cotton Oil Co. (1950) 92 NLRB 1033; enf. (CA 5; 1952) 197 F. (2d) 326, *supra,* involved an employer who had unlawfully refused to bargain in January of 1948. A strike followed. In late June or early July of 1948, the strikers applied for reinstatement, and were refused. A charge alleging that this denial of reinstatement was an 8(a)(3) violation was filed on December 18, 1948, less than six months after the denial of reinstatement, but more than six months after the alleged refusal to bargain. The Board held that the complaint was barred by Section 10(b). The Board stated, at page 1034:

> "The Act empowers the Board to prevent a respondent from engaging in unfair labor practices *only as therein provided.* In the amended Section 10(b), Congress incorporated a specific mandate that no complaint should issue 'based upon' any unfair labor practice occurring more than 6 months prior to the filing and service of the charge, which in this case took place on December 18, 1948. This provision thus excludes all allegations based upon unfair labor practices occurring before June 18, 1948. Otherwise stated, the Act authorizes the Board to make unfair labor practice findings only with respect to such unlawful conduct of the Respondent as occurred *on and after* that date. The principal unfair labor practice al-

leged during this period was the discriminatory refusal to reinstate the strikers. In view of the fact that the strikers had been permanently replaced before June 18, 1948, and that there was no showing of any vacancies available for them when they applied for reinstatement, this refusal did not constitute an unfair labor practice unless it could be shown that they had become unfair labor practice strikers *before* being replaced. In other words, they were economic strikers who took their chances on being replaced. Only if they can show that their strike was caused or prolonged by unfair labor practices are they entitled to preferred treatment.

"But it is just such a showing which the proviso to Section 10(c) expressly prohibits, for any finding of an unfair labor practice strike here would necessarily have to be 'based upon' unfair labor practices occurring more than 6 months prior to the charge. Because the proviso thus precludes finding an unfair labor practice strike and the consequent discriminatory refusal to reinstate the strikers, we must dismiss this allegation of the complaint. It follows that because the strikers were permanently replaced, and because the Union did not show that it represented a majority of these replacements on and after June 18, 1948, we must also dismiss the allegation of an unlawful refusal to bargain at any time during this period. In addition, we shall dismiss the allegations of the complaint to the effect that the Respondent in any manner violated the Act before June 18, 1948." (Emphasis added)

The above decision of the Board was affirmed by the Court of Appeals for the Fifth Circuit.

In *Brown and Root, Inc., supra*, a timely refusal to bargain charge had been filed against the employer in one proceeding and a cease and desist order based on a 8(a)(5) finding had been issued. Subsequently, a striker applied for reinstatement and was denied reinstatement. Within six months after his denial, but more than six months

after the employer had refused to bargain, the striker filed a charge based on his denial of reinstatement. It was held that Section 10(b) did not apply. The Trial Examiner said, at page 1075:

> "In the instant case, *unlike* the *Greenville* case, the Respondents have been *found guilty of unfair labor practices* in a *prior timely prosecution.*" (Emphasis added)

The Board stated, at page 1036:

> "In the case before us, *unlike* the *Greenville* case, a *separate timely charge was filed* with respect to the unfair labor practice causing the strike which, indeed, *culminated in a finding of a violation of Section 8(a)(5)* of the Act by the Board and the court in another proceeding." (Emphasis added)

This decision was affirmed by the Eighth Circuit.

In *Davis Firebrick Co.* (1961) 131 NLRB 393, at page 396, the Trial Examiner, with the approval of the Board, emphasized the essential difference between *Greenville Cotton* and *Brown and Root,* in the following language:

> "I cannot be persuaded that the Board's language is suspectible of the interpretation that the mere *timely filing* of the charge in the previous proceeding was sufficient to toll the provision of Section 10(b). It is abundantly clear, not only from the language of the Trial Examiner but also from the Board's decision, that there must have been more than a timely filing of the charge of a violation of Section 8(a)(5). There must also have been a proceeding in which the charge 'culminated' in a *finding* of the violation. It is obvious that the rationale of the second *Brown and Root* case is that it is not necessary to relitigate the issue of whether there had been a violation of Section 8(a)(5) when it had already been established in a prior proceeding (involving the same parties) of which judicial notice could be taken."

The Trial Examiner also stated that:

> ". . . evidence with respect to the conduct of Respondent in refusing to bargain or other unfair labor practices would not be background material, but necessary to establish part of the gravamen of the charge. However, I would be precluded from taking such evidence since it would be with respect to the actions of Respondent occurring over 13 months prior to the filing of the charges herein." (Page 396)

The majority of the court in the instant case discussed *Greenville Cotton Oil Co.* and *Brown and Root, Inc., supra*, and decided to follow *Brown and Root.* In distinguishing the cases, the majority stated as follows:

> "The Company relies on *Greenville Cotton Oil Co.*, 92 N.L.R.B. 1033, enf., 197 F. 2d 326 (C.A. 5), which held that § 10(b) precludes the Board from finding that a company has violated § 8(a)(3) by refusing to reinstate unfair labor practice strikers, if the unfair labor practice which caused the strike occurred more than six months prior to the charge. This case would seem to be authority for the Company's contention. The Trial Examiner, in the instant case, attempted to distinguish *Greenville Cotton* on the basis that there no charge had been filed with respect to the unfair labor practices which caused the strike. In a subsequent case, which reached a contrary result from *Greenville Cotton*, the Court attempted to distinguish the earlier case, but then said that in any event the Board's decision in *Greenville Cotton* reaches an illogical conclusion. *N.L.R.B.* v. *Brown & Root, Inc.*, 203 F. 2d 139, 146 (C.A. 8). The Court reasoned that the charge was not based upon failure to bargain, but upon the Company's refusal to reinstate strikers whose status was such as to entitle them to reinstatement. Applying this reasoning to the case at bar, the refusal to reinstate occurred in August, and the charge so alleging was filed in September and therefore was timely. We hold that this is the more logical approach." (App. A, *infra*, pages 22a-23a)

In the dissent in the instant case, Judge O'Sullivan, referring to the above cases, stated:

> "The Board and my brothers follow the case of *NLRB* v. *Brown and Root, Inc.*, 203 F. (2d) 139, 146 (CA 8, 1953). While it contains some facts different from the case before us, I recognize the *Brown and Root* case as contrary to my view. I respectfully disagree with its holding. I prefer the reasoning of *Greenville Cotton Oil Co.*, 92 NLRB 1033, affirmed *sub. nom. American Federation of Grain Millers* v. *NLRB*, 197 F. (2d) 451 (CA 5, 1952)." (App. A, *infra*, page 31a)

He then pointed out, as stated above, that:

> "In our case there was nothing to prevent the employees' union, which was quite active in this regard during the strike, to have made a timely charge that respondent's December 28, 1960 conduct was an unfair labor practice. Such charge would have tolled the statute and would permit a complaint 'based upon' it to be issued should respondents thereafter deny reinstatement to strikers replaced after the strike had become an unfair labor practice strike." (App. A, *infra*, pages 31a-32a)

3. The Decision Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As stated above, Section 10(b) bars a complaint based upon "any unfair labor practice occurring" more than six months before the filing of the charge. Under this language, if a striker is unlawfully replaced, when does the unfair labor practice *occur*? Is it when the replacement is hired—or when the union or striker is notified by the employer that the striker has been replaced permanently —or when the striker applies for reinstatement and reinstatement is denied? This important question of statutory

construction is clearly presented in the instant case, and should be decided by this Court.

It is undisputed that on February 8, 1961 (720a), the Union, in response to its request, was notified of the names of all strikers who had been permanently replaced during the period from the conversion of the strike on December 28, 1960 through February 8, 1961. The Board and the court have asked the Petitioner to reinstate a number of such employees, with back pay from the date reinstatement was denied. If, as alleged in the complaint and found, the employees whose names appeared on these lists were unfair labor practice strikers, the Petitioner had no right to notify them, through their bargaining agent, that they had been "permanently replaced," and such a notification, like a discharge notice, would appear to be a "discrimination in regard to hire," violative of Section 8(a)(3) of the Act. (App. B, *infra*, pages 32a-33a) Cf., *U. S. Sonics Corp.* (1962) 135 NLRB 818, 824-825; modified on other grounds (CA 1; 1963) 312 F. (2d) 610. Of course, it is arguable that such discrimination on February 8, 1961, would also be "based upon" the events of December 28, 1960, and that the limitations period must still run from that earlier date.

In *Bowen Products Corp.* (1955) 113 NLRB 731, an employer discriminatorily placed an employee's name at the bottom of the seniority roster on August 24, 1953. The union, as in the instant case, had notice of the employer's action at the time it occurred. 113 NLRB 732, footnote 4. The employee did not file a charge until after he had been laid off as a result of such action on October 20, 1953. The charge was filed on March 26, 1954. It was held that Section 10(b) barred the proceeding. The Board stated that:

> ". . . the only basis for holding that Seals' layoff was unlawful would be a finding that the low seniority given him on August 24 was the product of unlawful

discrimination within the meaning of the Act. Section 10(b) bars such a finding, even if supported substantively by the record." (Page 732)

The Board stated that:

> *"The placement of Seals at the bottom of the seniority roster on August 24, notwithstanding his prior service, was a fully consummated act at that time, which immediately created an adverse substantive condition of employment.* Thus, assuming such action to be unlawfully motivated, Seals knowingly then sustained an immediate injury under the Act which could have been remedied *had he filed charges within the statutory 6-month period of limitation.* To regard such an injury as a continuing unfair labor practice, because an otherwise proper layoff subsequently resulted therefrom, *would in effect render Section 10(b) meaningless.*" (Page 732; emphasis added)

The Board further stated that:

> ". . . the complainant may not establish the now barred claim that he was discriminated against on August 24 as the predicate for his present action seeking redress for his otherwise proper layoff on October 20. We are satisfied that this view comports with the congressional intent of Section 10(b) to preclude litigating stale unfair labor practices. As noted, the contrary view would require a respondent to collect evidence and find witnesses as to events occurring years before the filing of the charge." (Page 733)

Applying similar reasoning to the instant case, the denial of reinstatement in August 1961 was a direct result of the notification to the Union in February 1961 that the individuals concerned had been "permanently replaced." If replaced individuals were unfair labor practice strikers, they had a perfected right of action for violation of Section 8(a)(3) at the time of the above notification. The action,

if wrongful, could have been remedied had they filed charges within the statutory six month period of limitation thereafter. They did not do so. Therefore, their claims are barred.

In *Bowen*, the employee concerned experienced no immediate effects from the mere change of his name to a different place on the seniority list. The six-month period began to run from that date, however. Similarly, in the instant case, the employee who was permanently replaced was not immediately affected because he was still on strike. The event had occurred, however, to his knowledge, which would result in a denial of reinstatement when he subsequently abandoned the strike or the strike was ended.

The Trial Examiner in the instant case seemed to believe that the act of replacing a striker in an unfair labor practice strike was not itself a violation of Section 8(a)(3). It was apparently his view, and that of the court below, that a striker was not permanently replaced until the striker applied for reinstatement and was denied reinstatement. He stated that:

> ". . . the violation alleged is not replacement of the strikers, which is not in itself unlawful, but the refusal to reinstate them upon application, which did not occur until August 1961, and it is therefore from that date that the 6-month period of limitations in Section 10(b) runs." (JA 13a)

This view is erroneous. In *Bartlett-Collins Co.* (1954) 110 NLRB 395, 397-39; enf. (CA D.C.; 1956) 230 F. (2d) 212; cert. den. 351 U.S. 988 (1956), the Board stated:

> "Permanently replaced economic strikers merely have the right not to be penalized for their concerted activity, and are not entitled to preferential status in hiring. *They are in the position of applicants for new employment* as to whom the General Counsel must sustain his burden of proving discriminatory motiva-

tion on the part of the Respondent." (Emphasis added)

The statement that "*they are in the position of applicants for new employment*" clearly indicates that replaced strikers have lost their status as employees before they apply for reinstatement. Therefore, the act of replacing them must necessarily have affected their "tenure of employment" within the meaning of Section 8(a)(3).

Between 1947 and 1959, Section 9(c)(3) of the Act specified that, "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." Many elections were conducted during this twelve year period, during which strikers who had not been replaced were permitted to vote, and strikers who had been replaced were *not* permitted to vote, even though they had not applied for reinstatement. *Rowe-Jordan Furniture Corp.* (1949) 81 NLRB 190 was a typical case of this type. In disposing of election challenges, the Board stated, at page 193:

> "No evidence was adduced by the Petitioner to show that workers hired as replacements for strikers were employed only in a temporary capacity, and we find that in fact *they were hired as permanent employees, and thereby permanently replaced striking employees.*" (Emphasis added)

Similarly, in *Belmont Smelting & Refining Works, Inc.* (1956) 115 NLRB 495, the Board observed, at page 497:

> "During the course of the strike, the Employer maintained a *replacement chart* which indicates that *each of these 18 strikers was replaced by a specific new employee* hired before June 28, 1955. The Employer notified each replacement shortly after hiring that he was regarded as a permanent employee whose job would continue as long as work was available and his work was satisfactory." (Emphasis added)

The above cases show that the act of hiring a permanent replacement for a striker necessarily and immediately affects the "tenure of employment" of the striker. The six-month period of limitations must necessarily begin to run from this date, as in the case of a discharge, even though replacement is not in all respects the same as discharge.

Letters sent to the individuals by the Employer on August 15, 1961, denying reinstatement, stated that this action was a consequence of the previous replacement action. These letters stated that:

> "On February 8, 1961 we wrote Mr. Hyde and gave him a list of employees who had been permanently replaced between November 25, 1960 and February 8, 1961. together with the names of new employees who had been hired. *Your name was on the list of employees permanently replaced, so you had full notice at that time, through your bargaining representative, of your replacement.* . . . As you have been replaced, we regret that we cannot accept your application for reinstatement to your former job." (JA 728a-729a; emphasis added)

In *Knickerbocker Mfg. Co.* (1954) 109 NLRB 1195, four employees were discharged on July 31, 1951. On February 8, 1952, they filed a charge alleging discriminatory termination and refusal to reinstate. Subsequently, they applied again for work and filed a new charge alleging discriminatory refusal to employ. The Board, in dismissing the charges because of Section 10(b), stated at page 1196, that:

> "Because these [original] requests for a 'job' [made shortly after the discharges on July 31, 1951] followed so soon upon the heels of the discharges and were so closely related to the turmoil resulting from those discharges, we cannot view them as applications

for new employment but more in the nature of requests for reconsideration of the antecedent discharges."

The Board held that the original discharges were barred by Section 10(b), and that the March requests were likewise "barred by Section 10(b) of the Act."

The Board explained:

"We think it is clear that the amended charge raised a new and separate cause of action which must independently satisfy the limitations of Section 10(b). This view differs materially with the prior holdings of this Board in its *Cathey* and subsequent decisions that the filing of an original charge tolls the running of the 10(b) limitations so as to permit adjudication of any and all subsequent unfair labor practices. Such a broad interpretation of Section 10(b) has never, save for one possible exception, been adopted by the courts and is indeed contrary to the weight of judicial precedent." (Page 1197)

The Board concluded that:

"As the instant requests for employment in March occurred after the filing of the original charge and more than 6 months before the amended charge which first alleged them to be unfair labor practices, we hold that under Section 10(b) no unfair labor practice can be found. To the extent inconsistent herewith, the Board's prior interpretation of Section 10(b) as enunciated in *Cathey* and subsequent cases is hereby expressly overruled." (Page 1197)

Case No. SR-1615 is a decision of the General Counsel of the NLRB rendered and published November 2, 1961 (1961 CCH NLRB Sec. 10,570). A laid off employee applied for reinstatement in August 1960 and was refused. In November 1960, he again applied for reinstatement and was refused. He filed his charge on February 24, 1961,

alleging that the November rejection was discriminatory. It was held that Section 10(b) prevented the issuance of a complaint. The General Counsel stated that:

> ". . . the unfair labor practice had occurred not later than the date in August on which the company rejected the individual's initial request for reinstatement. Under the circumstances, and since this date was more than six months prior to the filing of the charge, further proceedings based thereon were deemed barred by Section 10(b) notwithstanding the individual's renewed request for reinstatement in November 1960.
>
> "The General Counsel concluded that, in light of the company's violation in August in discriminatorily refusing to reinstate the individual, its subsequent denial of the individual's renewed request for reinstatement in November did not amount to an independent violation of the Act." (1961 CCH NLRB at 16,381.)

In *NLRB* v. *Pennwoven, Inc.* (CA 3; 1952) 194 F. (2d) 521, an employer, in July of 1948, discriminatorily failed to recall three employees from layoff. These employees knew at the time that they had been passed over, but filed no charge seeking reinstatement until April 28, 1949. They contended that the failure to reinstate was a continuing offense and that the charge was, therefore, timely. The court held, at page 526, that:

> ". . . the charges were filed too late. To adopt the Board's theory of the continuing violation is not in accordance with what we believe the intent of the Congress was in establishing the six-months limitation period."

In *Local Lodge No. 1424* v. *NLRB* [*Bryan* case], *supra*, this Court completely repudiated the "continuing violation" theory. The Court stated that the petitioner's position in that case was that:

". . . since a complaint based upon that unfair labor practice was barred by limitations, that event itself could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement. They say, in short, that to apply in this situation the doctrine that § 10(b) is a statute of limitations, and not a rule of evidence, is to circumvent the purposes of the section, and that acceptance of the Board's position would mean that the statute of limitations would never run in a case of this kind. *We think petitioners' position represents the correct view of the matter.*" (362 U.S. at 415-416; emphasis added)

4. The Decision Conflicts with the FANT Decision of This Court.

In addition to violating the "six-month" aspect of Section 10(b), the Board and the court below have disregarded other equally important requirements of the statute. No complaint was ever filed—either before or after December 28, 1960—alleging the first violation of Section 8(a)(5) of the Act which the Board, with court approval, found to have occurred. The issuance of a complaint alleging the offense complained of is, by necessary implication, a mandatory requirement of the Act.

Also, such complaint, and any decision and order of the Board arising therefrom, must be based upon a charge. As stated above, a charge has never been filed—either before or after December 28, 1960—asserting that the petitioner ever bargained an issue to an impasse, or converted an economic strike to an unfair labor practice strike, or did anything on or about December 28, 1960 violative of the Act.

Admittedly, no charge of 8(a)(5) violation was filed at any time *after* December 28, 1960. The Board and the court below took the view, however, that the requirement of a charge under Section 10(b) was satisfied by charges

against the petitioner filed *before* December 28, 1960. In arriving at this conclusion, reliance was placed on the decision of this Court in *NLRB* v. *Fant Milling Co., supra.* In *Fant*, this Court, construing Section 10(b) held that Section 10(b) is satisfied by a charge filed *before* the commission of a violation of Section 8(a)(5) *if* the unfair labor practices committed subsequently are (a) "related to those alleged in the charge," and (b) "grow out of them while the proceeding is pending before the Board." Accord: *National Licorice Co.* v. *NLRB* (1940) 309 U.S. 350; 84 L.E. 799.

The meaning of *Fant* is illustrated by the facts of that case, as set forth in the opinion of the Board and the Intermediate Report of the Trial Examiner. The union in *Fant* was certified on June 26, 1953. Negotiations began at some time thereafter. On May 20, 1954, a charge was filed asserting that the company was bargaining in bad faith in violation of Section 8(a)(5). The Board found that:

> ". . . after November 21, 1953 . . . the Respondent was merely going through the motions of collective-bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act." *Fant Milling Co.* (1957) 117 NLRB 1277, 1282.

The Board further found that on October 4, 1954, after repeatedly refusing union requests for a general wage increase during the previous negotiations, the employer suddenly announced a general wage increase of 7¢ per hour without any prior notice or consultation with the union. Although the October increase occurred after the charge had been filed and while the case was pending before the Board, the Board considered this conduct of the employer in concluding that the employer never had any intention

of reaching agreement with the union, and had been bargaining in bad faith throughout the negotiations. The Board said:

> "We have no difficulty in determining the Respondent's bad faith throughout these protracted negotiations, particularly in view of the Respondent's unilateral effectuation of a general wage increase early in October 1954, while the negotiations were still in progress but without consultation with or even notice to the Union.
>
> * * * *
>
> "We find, rather, that the giving of this general increase while negotiations were still continuing, and in complete disregard of the Union's representative status, *provides the final insight into the Respondent's conduct of negotiations with the Union.*" (Pages 1278, 1282; emphasis added)

It is evident, therefore, that in *Fant*, the employer conduct which followed the filing of the charge was merely considered by the Board and the Supreme Court as evidence confirming the bad intention of the employer throughout the period of negotiations which preceded the filing of the charge, and was used by the Board to confirm its conclusion that bad faith negotiation occurred *during the period preceding the charge*. The giving of the increase unilaterally, after refusing the union's request for the increase during negotiations, was "related to" the unfair labor practices alleged in the charge, and was properly found to "grow out of them while the proceeding" was "pending before the Board." It did not constitute an independent cause of action, but was simply part and parcel of unfair conduct found by the Board to have occurred during the six-month period before the filing of the charge which constituted a violation of Section 8(a)(5).

The remaining question in the instant case, therefore, is whether the violation which the Board, with court approval, found to have occurred on December 28, 1960 was "related to" and evidence of unfair labor practices alleged in the charge and found by the Board to exist, and whether this alleged violation *grew out of* such unfair practices while the proceeding was pending before the Board. Expressed in other language, were the alleged violations of December 28th "continuations" of prior unfair labor practices, and "in pursuance of the same objects." 360 U.S. 301, 306. The answer must be in the negative. The instant case does not fit the *Fant* pattern for the following reasons:

1. Unlike *Fant*, the Board here has found that the Employer bargained in good faith throughout the entire period of negotiations preceding the filing of the charge and before the events of December 28, 1960. The factual situation would be similar only if the Board had found in *Fant* that the Employer bargained in good faith throughout the period before October 4, 1954, when the unilateral wage increase was granted. Under such circumstances, it seems clear that both the Board and the court would have concluded that an 8(a)(5) finding based solely on the October 4th unilateral increase was barred by the provisions of Section 10(b) of the Act.

2. Under the decisions of the Board and the courts in *Erie Resistor Co.* (1961) 132 NLRB 621; (CA 3; 1962) 303 F. (2d) 359; 53 LRRM 2121; 10 L.E. (2d) 308, in *NLRB* v. *Wooster Division of Borg-Warner* (1958) 356 U.S. 342; 2 L.E. (2d) 823, and in the instant case a proposal such as the October 7th proposal for "special seniority" or "superseniority" for strike replacements is a "permissive" but not a "mandatory" subject of collective bargaining. The contention that the Employer bargained this permissive subject of negotiation to an "impasse" on December 28, 1960, and that this unduly prolonged the

strike, therefore, involves a different "class of violation" than that set up in the charges which were timely filed, and is not truly "related to" the unfair labor practices alleged in the charges.

3. Bargaining the permissive proposal to an impasse on December 28, 1960, unlike *Fant*, was not evidence of any previously committed unfair labor practices and did not "grow out of them" while the proceeding was pending before the Board. There were no previous unfair labor practices, either alleged or proved, which the action found by the Board to have occurred on December 28th could or did "grow out of."

In the *Fant* decision, the Supreme Court said:

> "What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left 'carte blanche to expand the charge as they might please, or to ignore it altogether.' 258 F. 2d, at 856. Here we hold only that the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.'" (Page 309)

The decision of the Board and the court below in the instant case has left the Board, in violation of the decision of this Court quoted above, "carte blanche to expand the charge" as it saw fit and, indeed, "to ignore it altogether."

For the reasons detailed above, the *Fant* exception does not apply to this case, and, therefore, the charges filed prior to December 28, 1960 cannot be relied on as satisfying the requirements of Section 10(b) that there must be a proper charge as a basis for a NLRB proceeding and that no complaint can issue "based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

The Petitioner respectfully submits that the majority of the court below misinterpreted and misapplied the decision of this Court in *NLRB* v. *Fant Milling Co., supra.* In its opinion, the court below discussed this problem in the following language:

> "Thus the question is presented whether the charge of September 23, 1960, is effective to include the subsequent violation on December 28. Both the Company and the Board agree that the controlling case on this point is *N.L.R.B.* v. *Fant Milling Co.*, 360 U. S. 301. In that case a charge was filed in May 1954. In October the Company granted an unlawful unilateral wage increase. In January the Board proceeded with the May charge and considered the violation which occurred in October. The Supreme Court upheld the action of the Board, ruling that the Board in formulating a complaint and finding a violation of the Act can take cognizance of events occurring subsequent to the filing of the charge upon which the complaint is based, when such subsequent events are related to the conduct alleged in the charge and grow out of such conduct while the proceeding is pending before the Board.
>
> "The Company contends that in the instant case the violation is not related to the prior charge; that it bargained in good faith up to December 28, according to the findings of the Board; and that the cause of action, if any, arose on that date.
>
> "We hold that the tenor of the opinion of the Supreme Court in *N.L.R.B.* v. *Fant Milling Co.*, 360 U. S. 301, supra, calls for the same result in this case. The Court said: 'A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *N.L.R.B.* v. *Indiana & M. Electric Co.*, 318 U. S. 9, 18, 87 L. Ed. 579, 586, 63 S. Ct. 394. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and

in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act.' 360 U. S. at 307. Although the Court went on to warn that this was not to imply that the Board is to be left 'carte blanche to expand the charge as they might please, or to ignore it altogether,' the opinion accords a degree of latitude in this respect, to the end that the Board may administer the Act effectively." (App. A, *infra*, pages 21a-22a)

The dissenting Judge below on the other hand took a quite different view of *Fant*. In his opinion, he stated:

"Relying on *NLRB* v. *Fant Milling Co.*, 360 U. S. 301, the Board found that some charges of unfair labor practice, made prior to the December 28, 1960 conduct, permitted it to consider this latter conduct under the earlier charges. Therefore, it argued that such earlier charges tolled the running of the Statute of Limitations as to the 8(a)(5) violation. I am unable to follow this reasoning. Neither *Fant* nor *National Licorice Co.* v. *NLRB*, 309 U. S. 350, also relied upon by the Board, had anything to do with the Statute of Limitations. *Fant* merely held that it was permissible for the Board, in passing upon a charge of unfair labor practices, to consider conduct occurring subsequent to the date of the original charge where the subsequent unfair labor practices are 'related to those alleged in the charges' and 'grow out of them while the proceeding is pending before the Board.'

"In the case at bar, the conduct described in the earlier charges was found not to amount to unfair labor practices. In *Fant* the conduct described in the earlier charges was found to be illegal and that which occurred after the filing of the original charge was considered as merely a prolongation of the earlier illegal conduct. I cannot understand how charges made on September 23, October 20, and December 7, 1960, and found to be groundless can be used to toll the

running of the statute against events which had not yet occurred and which were never made the subject of a charge of unfair labor practice. Considering that neither *Fant* nor *National Licorice* dealt with a question of limitations, I cannot find them to be pertinent here." (App. A, *infra*, pages 30a-31a)

CONCLUSION

The court below has decided an important question of federal law, involving the construction of Section 10(b) of the Act, which has not been, but should be, settled by this Court. By a 2 to 1 decision, it has decided this important federal question in a way in conflict with applicable decisions of this Court. Two of the Judges below have purported to follow the decision of the United States Court of Appeals for the Eighth Circuit, and one of the Judges below has purported to follow a conflicting decision rendered by the Court of Appeals for the Fifth Circuit. The resulting decision is itself in conflict with the decision of the Court of Appeals for the Fifth Circuit in *NLRB* v. *Greenville Cotton Oil Co., supra.*

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. HOLLISTER
603 Dixie Terminal Building
Cincinnati 2, Ohio
Attorney for Petitioner

August 10, 1964

APPENDIX A

(Filed March 31, 1964)

Nos. 15289-15330

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

THE PHILIP CAREY MANUFACTURING COMPANY, MIAMI CABINET DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, AND ITS LOCAL UNION No. 689,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITIONS to Review and Set Aside Portions of an Order of the National Labor Relations Board and Cross-Petition of the Board for Enforcement.

Decided March 31, 1964.

Before: O'SULLIVAN, Acting Chief Judge, PHILLIPS, Circuit Judge, and MAGRUDER, Senior Circuit Judge.*

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* Senior Circuit Judge, First Circuit, sitting by designation.

Appendix A

PHILLIPS, Circuit Judge. This is a vigorously contested labor case, involving a number of issues.

The parties are the Philip Carey Manufacturing Company, hereinafter called the Company, and the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, and its local union No. 689, hereinafter referred to as the Union. The case is before this Court on petitions for review filed by both the Company and the charging Union, and on the cross-petition of the National Labor Relations Board for enforcement of its order. The decision and order of the Board are reported at 140 N.L.R.B. No. 90.

The circumstances giving rise to this controversy, in summary, are as follows: Early in 1960 the Union began its campaign to organize the Company's Middletown, Ohio, plant. An election was held on March 9 resulting in 122 votes for the Union, 106 votes for Miami Cabinet Independent Union, and six votes for no union. On March 17 the Union was duly certified.

Negotiations for a contract began on April 18, 1960. The Union submitted a proposed contract on May 16 and agreement was reached eventually on a number of issues, including grievance and arbitration procedures. On July 28 the parties met for the eleventh time, and the Company submitted a proposed complete contract. This proposal incorporated all provisions agreed upon at the ten previous negotiation meetings and contained a number of improvements over existing benefits. The estimated total value of the general increase and monetary fringe benefits was nine cents per hour apart from incidental pay increases resulting from abolition of rate ranges. The Board found the Company offer of July 28 to be an economic package

slightly greater than that offered by the Company in any of its other organized plants.[1]

The Union rejected the Company's offer because it revised past practices with respect to accumulation of seniority during lay offs and rates to be paid during temporary transfers to avoid lay off.[2]

Between July 28, when the Company's proposal was made, and September 6, the parties had eleven more meetings. On September 6 the employees voted to go out on strike, and the strike began at midnight.

On September 26 the Company wrote a letter to the Union renewing its proposal, with the exception of a check-off provision, and stating that if the offer was not accepted by September 30, the Company would modify its seniority proposal so as to give "special seniority rights" for lay off and recall purposes to nonstrikers and to employees replacing strikers. The Company also stated in this letter that it would be necessary to commence the hiring of permanent replacements, but that strikers who reported for work by October 3 would be reemployed. Copies of this letter were sent to all employees. By "special seniority," the Company meant that, for layoff and recall

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[1] The Company operates eight plants in the United States and two in Canada. All but one of these are organized.

[2] There is a marked disagreement as to the effect of these two disputed proposals. In its brief the Union says that the Company "withdrew benefits which the employees had enjoyed for as long as any witness could remember" and charges that the Company's "stubborn, bigoted adherence to its position . . . reveals its initial ulterior purpose." The Trial Examiner found that part of the transfer proposal "represented a potential net gain to the employees," under which some transferred employees would be "worse off" and some "better off" and that the proposal concerning accumulation of seniority during lay off would benefit employees laid off for more than six months and be less favorable for employees laid off for less than six months.

purposes only, the seniority of any employee would accrue from the first day he worked after the strike began.[3]

The parties met on September 29, but without affirmative result. They met again on October 7, and the Company presented its written proposal for "special seniority" and said that, absent agreement, this would become a part of its contract offer.

The Company began hiring replacements on October 12. After meeting on October 29 the parties next met on November 22, when the Union presented some new proposals. This meeting continued the following day, November 23 and there is conflicting testimony as to exactly what occurred. From a synthesis of the testimony, the Trial Examiner found that the two significant issues had become the Company's insistence on its superseniority [4] proposal and the Union's insistence on reinstatement of all strikers.

The parties next met on December 28, when the Union said that it could not recognize the replacements in the plant. The Company contends that the issue of superseniority was not discussed at this meeting, though a union representative testified that there was no change in the Company's position on superseniority. After this meeting the parties recessed, subject to further call by the Mediation Service. There were no further meetings until August 23, 1961.

Meanwhile, the Company continued its restaffing program, which was virtually completed by February 1, 1961.

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[3] Thus a nonstriker, returning striker, or newly hired employee who worked on October 15, for example, would have greater seniority for lay off or recall than an unreplaced striker who did not return to work until October 16. Therefore the proposal would have deprived returning unreplaced strikers of all their accumulated seniority for purposes of lay off and recall.

[4] The Company refers to this proposal as "special seniority" and the Union and the Board describe it as "superseniority." In this case the two terms have the same meaning.

Appendix A

On August 3, 1961, the Union sent the Company, on behalf of 122 named strikers, unconditional offers to return to work. The Company replied, on August 9, 1961, that fifteen of the named employees had been rehired, that ten of the strikers had been denied reinstatement because of strike misconduct, and that the rest had been denied reinstatement because they had been permanently replaced.

On August 10, 1961, the Company wrote to the Union that it was withdrawing its superseniority proposal. This letter came on the heels of the Board's decision in *Erie Resistor Corp.*, 132 N.L.R.B. 621, the import of which will be discussed hereinafter.

The Union construed this letter to mean that the Company was also withdrawing from its position that replaced strikers had no reinstatement rights. The Union wired the Company that it interpreted this letter to mean that the Company would rehire all the strikers who had applied for reinstatement, and give notification that they would report for work on August 14. The Union also suggested a meeting on August 14, stating that "numerous problems are posed." This was the Union's first request for a meeting since December 28, 1960.

The Company promptly replied to the Union by wire, stating unequivocally that all strikers not yet rehired had been permanently replaced.

The parties met on August 23, 1961, and the Company explained that its letter of August 10 had meant only to withdraw the superseniority proposal, and nothing more.

The last meeting was held September 7, 1961. The Company offered a proposed contract at this meeting which embodied the July 28, 1960, proposal with two changes, and with the superseniority proposal omitted. The Union said that it could not accept the contract without reinstatement of the strikers. There were no further meetings.

Appendix A

The following questions are presented:

(a) Was the strike an economic strike or an unfair labor practice strike at its inception? The Board held it to be an economic strike.

(b) Did the Company put into effect a program of superseniority in violation of §§ 8(a)(1) and 8(a)(3) of the Act, 29 U. S. C. §§ 158(a)(1) and (a)(3)? The Board answered in the negative.

(c) Did the Company insist upon a contractual provision for superseniority to the point of impasse in violation of § 8(a)(5), 29 U. S. C. § 158(a)(5) and, if so, as of what date? The Board answered in the affirmative, as of December 28, 1960.

(d) Did the insistence of the Company upon superseniority convert the strike into an unfair labor practice strike, and, if so, as of what date? The Board answered in the affirmative, as of December 28, 1960.

(e) Were twenty-eight unfair labor practice strikers entitled to reinstatement and back pay? The Board answered in the affirmative.

(f) Should interest be allowed on the back pay awards? The Board answered in the affirmative.

(g) Were the charges of unfair labor practices in question barred by the six-month limitation provisions of Section 10(b) of the Act, 29 U. S. C. § 160(b)? The Board answered in the negative.

(h) Did certain statements made by four supervisory personnel constitute coercive attempts on the part of the Company to induce employees to abandon the strike, in violation of Section 8(a)(1) of the Act, 29 U. S. C. § 158 (a)(1)? The Board answered in the affirmative.

(i) Did the Trial Examiner properly exercise his discretion when he granted the General Counsel's motion to

strike the names of four strikers from the amended complaint on the ground that they had engaged in misconduct which barred their reinstatement? The Board answered in the affirmative.

(j) Should the Company be required to continue to bargain with the Union under the circumstances of this case and despite the Union's loss of majority? The Board answered in the affirmative.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively the Board ordered the Company upon request to bargain with the Union in good faith; offer reinstatement to those reapplying strikers who were not replaced before December 28, 1960 and reimburse them for any loss of pay they may have suffered by reason of the discrimination against them, plus interest; and to post the customary notices. The Company contends that the Board's findings of unfair labor practices against it are unwarranted and that the order should not be enforced. The Union asserts that various findings are erroneous and that the Board should have found additional violations and should have directed reinstatement of all replaced strikers.

We grant enforcement in part and deny enforcement in part.

(a) The Trial Examiner found that the Company's proposed contract of July 28 constituted an ultimate offer, and thereafter created a bargaining vacuum; that this constituted a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act, 29 U. S. C. § 158(a)(5), which contributed to the strike of September 6; and that the strike was therefore an unfair labor practice strike from the beginning.

With these findings the Board disagreed. It stressed the fact that the July 28 offer came at the eleventh meeting of the parties, and observed that "there comes a point in any negotiation where the positions of the parties are set and beyond which they will not go." The Board concluded that the Company continued to bargain in good faith after the July 28 offer, and therefore the strike was an economic strike at its inception. The Union would have this Court find, as did the Trial Examiner, that the proposed contract submitted by the Company on July 28, 1960, constituted an ultimatum, created a bargaining vacuum, and rendered ensuing negotiations bad faith bargaining, thereby contributing to the strike of September 6, 1960.

We find that the holding of the Board on this question is supported by substantial evidence on the record and that the holding of the Trial Examiner was erroneous. As the Board pointed out, July 28 was the eleventh meeting between the parties and the Company was entitled to take a definite position at that time. The proposed contract contained a number of improvements over existing benefits and was the biggest economic package offered by the Company at any of its seven other plants in the United States, as set forth above in more detail. Furthermore there were eleven more meetings between July 28 and the date of the strike.

We therefore approve the holding of the Board that the Company did not exceed the limits of permissible bargaining by adhering substantially to its July 28 proposal and that the Company continued to bargain in good faith from July 28 to the time of the strike on September 6. From this conclusion it necessarily follows, as found by the Board, that the strike was an economic strike in its inception.

Appendix A

It is established law that if an employee is replaced while on an economic strike, he is not entitled to reinstatement as a matter of right. So long as the strike retained the status of an economic strike, the Company had a right to employ replacements and was not required to reinstate replaced striking employees upon their election to return to work. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

(b) The Union contends that the Company put into effect a system of superseniority during the strike and that the Company thereby violated Section 8(a)(3) of the Act, 29 U. S. C. § 158(a)(3), relying upon *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U. S. 221, and *Swarco, Inc.* v. *N.L.R.B.*, 303 F.2d 668 (C. A. 6). Both the Trial Examiner and the Board found that superseniority was never placed in effect. While the testimony is conflicting on this point, we find substantial evidence on the record to support this holding of the Board. The record shows that company representatives denied that superseniority was put into effect; there were no changes in the Company's seniority lists; in interviewing replacements the Company did not discuss superseniority and gave no assurance of superseniority to job applicants; and no Company advertisements for job applicants during the strike made any reference to superseniority. In finding that the Company never put superseniority into effect, the Board performed its function "to reconcile the conflicting testimony and to determine the credit or weight to be attached to the testimony of the various witnesses." *N.L.R.B.* v. *Sawyer Downtown Motors*, 213 F.2d 514, 515 (C. A. 7); *N.L.R.B.* v. *Aurora City Lines, Inc.*, 299 F.2d 229, 232 (C. A. 7). Therefore, the Board's findings on this issue, which are supported by substantial evidence. will not be disturbed. *Old King Cole* v. *N.L.R.B.*, 250 F.2d 791, 792 (C. A. 6); *Raser Tanning Co.*

v. *N.L.R.B.*, 276 F.2d 80, 84 (C. A. 6), cert. denied, 363 U. S. 830.

(c) We now come to the most difficult question in the case, and one which will be determinative of some of the other issues. This is the question of the Company's superseniority proposal and its effect upon the strike. The Board, as set out above, found that the Company's insistence on this proposal converted the strike into an unfair labor practice strike on December 28. The Union argues that insistence on superseniority converted the strike prior to this time, and the Company contends that the strike was never converted from its status as an economic strike.

Before turning to the question of the conversion of the strike, there should be some consideration of the legal significance of superseniority. The company contends that the fact that superseniority was never placed in effect serves to distinguish this case from *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U. S. 221; *Swarco, Inc.* v. *N.L.R.B.*, 303 F.2d 668 (C. A. 6); and *Griffin Pipe Division of Griffin Wheel Co.* v. *N.L.R.B.*, 320 F.2d 656 (C. A. 7). In those cases superseniority plans were found to be unlawful, but in each case the plan had been put into effect.

This does not mean, however, that superseniority must be put into effect in order to be unlawful. A careful delineation must be made of the issue here involved. The three above-cited cases stand for two separate propositions. To grant superseniority to replacements and returning strikers is discrimination in violation of § 8(a)(3) of the Act, 29 U. S. C. § 158(a)(3). *N.L.R.B.* v. *Erie Resistor Corp.*, supra; *Swarco, Inc.* v. *N.L.R.B.*, supra. To insist on a superseniority provision in the contract may constitute a refusal to bargain in violation of § 8(a)(5), 29 U. S. C. § 158(a)(5). *N.L.R.B.* v. *Erie Resistor Corp.*, supra;

Griffin Pipe Division of Griffin Wheel Co. v. *N.L.R.B.*, supra. It is important that the distinction between the effects of *enforcing* and *insisting upon* superseniority be made clear. Thus, in the instant case, the Company never put into effect a superseniority plan and therefore did not, in this respect, violate § 8(a)(3). The question remains whether the Company so insisted on superseniority to a point of impasse that it constituted a refusal to bargain in violation of § 8(a)(5).

Before proceeding to the case at hand, some consideration should be given to the meaning of the word "insistence" in this context. The Union, apparently in the hope that insistence will be equated with mere advocacy, refers to the following quotation: "If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain." *Industrial Union of Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615, 618 (C. A. 3), citing *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, and *N.L.R.B.* v. *Davison*, 318 F.2d 550 (C. A. 4). All of these cases use merely the word "insistence"; other cases would indicate that insistence, in this context, means insistence to the point of impasse. In *International Longshoremen's Assn.* v. *N.L.R.B.*, 277 F.2d 681, 683 (C. A. D. C.), it was said: "The union had a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it did not posit the matter *as an ultimatum.*" (Emphasis added.) In the *Erie Resistor* case the Board said: "Respondent's continued insistence on this or a similar proposal, *as a condition of negotiating an agreement* with the Union, constituted a violation of § 8(a)(5)." 132 N.L.R.B at 631. (Emphasis added.) Finally, the Trial Examiner in the instant case said: "While the meaning of

'insist' as used in this context has not been precisely defined, it would seem to connote, at the very least, persisting in a proposal to the point of impasse, notwithstanding objection thereto by the other party to the bargaining."

Now, with this background in mind, we turn to the case at hand to determine whether, and at what point, the Company insisted on su[redacted]iority to a point of impasse.

The Company's s[redacted]eniority proposal was first made in its letter of September 26. The Board found that the Company insisted on the inclusion of this provision in any contract it might sign, and that this insistence caused the bargaining negotiations to reach an impasse on December 28. The Board noted that after that date there were no further meetings until the Company withdrew its superseniority proposal. The Board concluded that the Company's insistence on its proposal contributed materially to the prolongation of the strike after December 28, and that on that date the strike was converted from an economic strike to an unfair labor practice strike.

Here it might be noted that Board Member Brown was of the opinion that the letter of September 26 constituted a threat to institute superseniority in violation of § 8(a)(1), 29 U. S. C. § 158(a)(1), and that on this date the strike was converted to an unfair labor practice strike.

The Union contends that the strike was an unfair labor practice strike from its inception on September 6, but, in the alternative, that it was converted into an unfair labor practice strike well before December 28. There are several dates which the Union asserts as earlier alternatives to December 28.

There can be no doubt that the Union opposed vigorously the superseniority proposal and that it immediately became a major obstacle in negotiations.

The Union urges that this Court adopt the view of Board Member Brown to the effect that the Company's letter of September 26, which said that the Company would make superseniority a part of its proposed contract, constituted a violation of § 8(a)(1), in that it threatened to institute superseniority and thereby coerced the strikers; and that therefore the strike was converted into an unfair labor practice strike on that date. The Board held that this letter did not convert the strike, and thus it was not necessary to decide whether the letter constituted an independent violation of § 8(a)(1).

The letter of September 26 said simply that, unless agreement was reached, the Company would make superseniority *a part of its proposed contract.* This did not mean necessarily that the Company was putting superseniority into effect, in violation of § 8(a)(3), and we find that this letter, in and of itself, did not cause the negotiations to reach an impasse, in violation of § 8(a)(5).

The Union next contends that the strike was converted into an unfair labor practice strike as of October 7. At a meeting of the parties on that date the Company presented its written superseniority proposal and made it a part of its proposed contract. The Union says that by making superseniority a part of its proposal the Company insisted upon it to a point of impasse in violation of § 8(a)(5).

Neither the Examiner nor the Board found that bargaining reached an impasse on October 7. There were further meetings in October and November, which tend to weigh against the contention that bargaining had reached an impasse at that time.

The Union next argues in the alternative that the Company insisted upon superseniority to the point of impasse at a meeting held October 19. The Trial Examiner and

Board ruled to the contrary, and we find that this holding is supported by substantial evidence on the record.

The next important meeting, for our purposes, was held November 22-23. The Trial Examiner found that at this meeting disagreement was centered on two issues: the Company's superseniority proposal, and the Union's insistence that all strikers be reinstated; and that the other issues had become less significant.

Both the Examiner and the Board passed over the November meeting, and concluded that the Company's insistence on superseniority caused an impasse (and thus converted the strike into an unfair labor practice strike) at the next meeting, held on December 28.

The Company contends that it never insisted upon superseniority to the point of impasse, arguing that even if it had withdrawn its superseniority proposal at the November or December meetings, the Union's insistence upon reinstatement of all strikers would have remained a major obstacle to agreement. It is well established, however, that in order to reach an impasse in violation of Section 8(a)(5) it is not necessary that the Company's proposal be the sole cause for failure of agreement. *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342; *Industrial Union of Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615, 618 (C. A. 3).

In support of its argument that the superseniority proposal did not prolong the strike, the Company points out that no agreement was reached when it withdrew its superseniority proposal in August 1961. We agree with the holding of the Trial Examiner and the Board that this argument is not conclusive in view of the change in situation as between November and December 1960, when only about one-third of the strikers had been replaced, and August 1961 when all strikers had been replaced.

We find substantial evidence on the record to the effect that the Company's representative took the adamant position at the meeting of November 23 that the Company would not sign a contract without superseniority, and that this position had not changed at the time of the next meeting on December 28.

As said by the Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, supra: "[S]uperseniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted." 373 U. S. at 231.

The holding of the Board that the Company did, in fact, insist upon superseniority to the point of impasse in violation of § 8(a)(5), 29 U. S. C. § 158(a)(5), is supported by substantial evidence. The evidence might well be held to support a holding that the point of impasse was reached either on November 23 or December 28. In some respects the proof points more strongly to the former date, but, considering the record as a whole, we do not disturb the finding of the Trial Examiner and the Board that the point of impasse was reached on December 28. The choice of the later date over the former is supported by the very fact that another meeting was held in December, and the fact that on November 23 the Union made some new proposals, thereby indicating that it did not consider the negotiations to be at an impasse at that time, whereas no further meetings were held after December 28 until the Company had withdrawn its superseniority proposal approximately eight months later in August 1961.

The burden was on the Company to show that the strike would have continued even if it had withdrawn its proposal of superseniority. *N.L.R.B.* v. *Wooster Division of*

Borg-Warner Corp., 236 F.2d 898, 907 (C. A. 6), reversed in other respects, 356 U. S. 342.

(d) Accordingly we approve the holding of the Board that the strike was converted into an unfair labor practice strike as of December 28, 1960.

(e) The Board directed that the Company offer to twenty-eight employees who were replaced after the strike had been converted into an unfair labor practice strike on December 28, 1960, reinstatement to their former or substantially equivalent employment without loss of seniority or other rights and privileges, discharging if necessary any replacements hired on or after December 28, 1960; and that the Company make these employees whole for any loss of earnings they may have suffered by reason of discrimination against them, from the date of their unconditional application for reinstatement to the date of the Company's offer of reinstatement, less net earnings.

The Company was obligated to reinstate unfair labor practice striking employees upon their unconditional offers to return to work. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U. S. 270, 278; *N.L.R.B* v. *Deena Artware, Inc.*, 198 F.2d 645, 651-652 (C. A. 6), cert. denied, 345 U. S. 906; *Webb Fuel Co.* v. *N.L.R.B.*, 308 F.2d 936, 937 (C. A. 6).

We grant enforcement of this part of the order of the Board.

(f) The next question is whether the Board's direction that the Company pay interest at six per cent upon the awards of back pay is a valid exercise of the powers of the Board.

The statute[5] contains no express provision authorizing the Board to allow interest on back pay awards. For

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[5] Section 10(c) of the Act, 29 U. S. C. § 160(c) provides in part as follows:

twenty-six years the Board adhered to a policy of not allowing interest on such awards. In 1962 this policy was changed by a three-to-two decision so as to allow interest. *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716.

It is well established that the omission of a mention of interest in statutes which create obligations does not show necessarily a Congressional intent to deny interest. As said by the Supreme Court in *Rodgers* v. *United States*, 332 U. S. 371, 373:

> "[T]he failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. *Billings* v. *United States*, 232 U. S. 261, 284-288. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. See, e.g., *Royal Indemnity Co.* v. *United States*, supra; *Board of Comm'rs* v. *United States*, 308 U. S. 343.
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> "As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic

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"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. See, e.g., *Brooklyn Savings Bank* v. *O'Neil, supra; United States* v. *North Carolina*, 136 U. S. 211, 216; *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168."

For example, interest awards were held proper, even though interest was not mentioned in the applicable statutes, where a veteran brought suit for loss of compensation suffered as a result of wrongful refusal to reemploy him under the Universal Military Training and Service Act, 50 U. S. C. App. § 459, *Travis* v. *Schwartz Manufacturing Co.*, 216 F.2d 448 (C. A. 7); and where a suit was brought on behalf of employees under the Walsh-Healey Act, 41 U. S. C. § 36, to recover underpayments by contractors. *Mitchell* v. *Riegel Textile, Inc.*, 259 F.2d 954 (C. A. D. C.).

In *United States* v. *United Drill & Tool Corp.*, 183 F.2d 998, 999 (C. A. D. C.) the court said:

> "Statutory obligations may bear interest even though the statute makes no provision for it. Interest on such obligations is or is not payable depending upon the purpose of the statutory enactment and upon principles of equity. If the obligation is in the nature of a debt it is deemed interest-bearing, because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money."

It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day. For example, many

states have enacted statutes regulating the time of payment of wages, 31 Am. Jur. *Labor* § 827, p. 995 et seq. The National Bankruptcy Act accords priority to wage claims. 11 U. S. C. § 104(a)(2). Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest at six per cent or higher.

A back pay award creates a debtor-creditor relationship. *Reserve Supply Corporation* v. *N.L.R.B.*, 317 F.2d 785, 789 (C. A. 2); cf. *Nathanson* v. *N.L.R.B.*, 344 U. S. 25.

It is true that the purpose of the Labor Act is remedial and not punitive. *Republic Steel Corp.* v. *N.L.R.B.*, 311 U. S. 7, 10. The contention that an award of interest is violative of these principles was answered as follows in *N.L.R.B.* v. *Globe Products Corp.*, 322 F.2d 694, 697 (C. A. 4):

> "Underlying the long-accepted practice of awarding interest in debtor-creditor cases is the principle that to do so fully compensates the creditor for the loss of the use of his money. Under the Act, an award of back pay is treated as a debt, *Nathanson* v. *N.L.R.B.*, 344 U. S. 25, 27-28, 73 S. Ct. 80, 97 L. Ed. 23 (1952), and where there has been delay it does not appear arbitrary for the Board to include interest. Such an allowance, which merely makes the employee whole, is in no sense punitive as against the employer."

When the Board issues a back pay order, it enforces public and not private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265, 269.

Under its broad discretionary powers "to take such affirmative action including reinstatement of employees with or without back pay" as will effectuate the purposes of the Act, the Board is authorized to effect "a restoration of the

situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U. S. 177, 194, and may make a substantial departure from its previous method of computing back pay, *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344. We accordingly join the other Circuits which have passed upon this question in holding that the Board has the discretionary power to allow interest on back pay awards, which was exercised validly in this case. *N.L.R.B.* v. *Central Illinois Public Service Company*, ... F.2d ... (C. A. 7); *Revere Copper and Brass, Inc.* v. *N.L.R.B.*, 324 F.2d 132 (C. A. 7); *Marshfield Steel Co.* v. *N.L.R.B.*, 324 F.2d 333 (C. A. 8); *N.L.R.B.* v. *Globe Products Corp.*, 322 F.2d 694, 696-97 (C. A. 4), supra; *International Brotherhood of Operative Potters, AFL-CIO* v. *N.L.R.B.*, 320 F.2d 757 (C. A. D. C.); *Reserve Supply Corp.* v. *N.L.R.B.*, 317 F.2d 785, 789 (C. A. 2), supra.

Enforcement is granted as to this part of the order of the Board.

(g) The Company argues at some length that the order of the Board directing continued recognition of the Union and reinstatement of strikers is barred by the limitation in § 10(b) of the Act, 29 U. S. C. § 160(b), which provides in pertinent part, "[T]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Here the § 8(a)(5) violation, bargaining to an impasse, occurred on December 28, 1960. The first charge in this case was filed September 23, 1960; an amended charge was filed October 20; and a new charge filed December 7. On July 28, 1961, these were consolidated and a complaint issued. On September 12, 1961, an amended charge was filed, and on October 3, 1961, a motion was filed to amend

the complaint. These latter three came more than six months after December 28, 1960, the date of the § 8(a)(5) violation.

Thus the question is presented whether the charge of September 23, 1960, is effective to include the subsequent violation on December 28. Both the Company and the Board agree that the controlling case on this point is *N.L.R.B.* v. *Fant Milling Co.*, 360 U. S. 301. In that case a charge was filed in May 1954. In October the Company granted an unlawful unilateral wage increase. In January the Board proceeded with the May charge and considered the violation which occurred in October. The Supreme Court upheld the action of the Board, ruling that the Board in formulating a complaint and finding a violation of the Act can take cognizance of events occurring subsequent to the filing of the charge upon which the complaint is based, when such subsequent events are related to the conduct alleged in the charge and grew out of such conduct while the proceeding is pending before the Board.

The Company contends that in the instant case the violation is not related to the prior charge; that it bargained in good faith up to December 28, according to the findings of the Board; and that the cause of action, if any, arose on that date.

We hold that the tenor of the opinion of the Supreme Court in *N.L.R.B.* v. *Fant Milling Co.*, 360 U. S. 301, supra, calls for the same result in this case. The Court said: "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *N.L.R.B.* v. *Indiana & M. Electric Co.*, 318 U. S. 9, 18, 87 L. Ed. 579, 586, 63 S. Ct. 394. The responsibility of making that inquiry, and of

framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act." 360 U. S. at 307. Although the Court went on to warn that this was not to imply that the Board is to be left "carte blanche to expand the charge as they might please, or to ignore it altogether," the opinion accords a degree of latitude in this respect, to the end that the Board may administer the Act effectively.

Further relying upon § 10(b), the Company asserts that on September 12, 1961, a charge was filed alleging that the Company refused, in August, to reinstate certain strikers. The Company relies on *Greenville Cotton Oil Co.*, 92 N. L. R. B. 1033, enf., 197 F.2d 326 (C. A. 5), which held that § 10(b) precludes the Board from finding that a company has violated § 8(a)(3) by refusing to reinstate unfair labor practice strikers, if the unfair labor practice which caused the strike occurred more than six months prior to the charge. This case would seem to be authority for the Company's contention. The Trial Examiner, in the instant case, attempted to distinguish *Greenville Cotton* on the basis that there no charge had been filed with respect to the unfair labor practices which caused the strike. In a subsequent case, which reached a contrary result from *Greenville Cotton*, the Court attempted to distinguish the earlier case, but then said that in any event the Board's decision in *Greenville Cotton* reaches an illogical conclusion. *N.L.R.B.* v. *Brown & Root, Inc.*, 203 F.2d 139, 146 (C. A. 8). The Court reasoned that the charge was not based upon failure to bargain, but upon the Company's

refusal to reinstate strikers whose status was such as to entitle them to reinstatement Applying this reasoning to the case at bar, the refusal to reinstate occurred in August, and the charge so alleging was filed in September and therefore was timely. We hold that this is the more logical approach.

Related to the same point, the Company argues, somewhat alternatively, that it notified the Union on February 8, 1961, of the names of the employees who had been permanently replaced, and that the alleged violation of § 8(a)(3) occurred at this time, and the charge filed September 12 was more than six months later and therefore not timely. We agree with the Trial Examiner in his disposition of this question: "[T]he violation alleged is not replacement of the strikers, which is not in itself unlawful, but the refusal to reinstate them upon application, which did not occur until August 1961."

We accordingly hold that the six-month limitation prescribed by the statute does not bar the charges upon which the order of the Board in this case is based.

(h) We now come to the alleged § 8(a)(1) violations. Both the Examiner and the Board found that certain minor supervisory employees made statements coercive in nature. We take up each supervisor in turn.

Earl Goforth: employee Lairson testified that Goforth asked him to come back to work because Goforth understood that if enough strikers returned to work, along with the replacements hired thus far, the Company would put into effect the contract offered to the Union.

The Company correctly points out that an employer is free to communicate with and solicit economic strikers, so long as there is no threat or promise of benefit. *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144, 153 (C. A. 7);

N.L.R.B. v. *Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 905 (C. A. 6). The Board says, however, that this statement by Goforth went beyond permissible limits, citing *N.L.R.B.* v. *Wooster Div. of Borg-Warner*, supra. In that case there was a clearer promise of benefit. Here the statement by Goforth seems relatively harmless, and quite obviously was no more than the expression of a personal opinion.

Kenneth Page: employee Lairson said that Page told him "You won't get nothing out of it [the Union]." Page testified that Lairson had originated the conversation and that he (Page) had only said "in my opinion we would lose more than we would gain."

Richard Schneider: employee Smith testified that Schneider told him "he was just afraid that the Company might move to Indiana or someplace where labor was cheaper." Schneider denied making this statement, but the Trial Examiner credited Smith.

Elmer Gibson: when asked by employee Underwood how the Company felt, Gibson said "he did not expect this company to give us a contract," and expressed the opinion that the Company would try to "drag it out."

As regards Schneider and Gibson, the Trial Examiner acknowledged that their statements were "couched in terms of an expression of personal opinion." This, argues the Company, should have settled the matter, since expressions of opinion are allowable. It has been said that "a prediction not coupled wit' a threat to use the employer's economic power to make the prediction a reality" is permissible. *N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F.2d 109, 118 (C. A. 3). Here none of these minor supervisors was in a position to make his opinion a reality

Furthermore, the opinions expressed by all four of these minor supervisory employees proved to be erroneous. The Company did not put into effect for the benefit of returning strikers and replacements the contract that had been offered to the Union. Although many of the strikers "got nothing out of the strike," they were offered a contract containing substantial improvements over existing benefits which exceeded the benefits provided at the Company's other plants in the United States. No officer of the Company at the policy making level is shown to have threatened to move the plant to another location. Rather than "dragging it out" the Company bargained in good faith during at least twenty-seven meetings.

The Board cites *N.L.R.B.* v. *Kingsford*, 313 F.2d 826, 832 (C. A. 6), where it was said: "Even though such statements may be expressive of opinion only, if their reasonable tendency is coercive in effect, they are violative of Section 8(a)(1)." It should be noted, however, that the statements in the *Kingsford* case were reaffirmed by the president of the Company in an address to the employees on the eve of a representation election, which poses a situation far different from the comments shown to have been made by the four minor supervisory employees in the instant case.

We therefore set aside and deny enforcement of that part of the Board's order holding the Company to be guilty of § 8(a)(1) violations.

(i) The Union challenges the action of the Trial Examiner in granting a motion by the General Counsel to strike the names of four strikers from the complaint over the objection of the charging party. The motion of the General Counsel was as follows: "I move to delete those persons because in view of the General Counsel, they have

engaged in misconduct which disqualifies them from reinstatement." It is charged that the Board was in error in allowing the issue of the misconduct and reinstatement rights of these four strikers to have been decided unilaterally by the General Counsel, rather than to have made the decision itself after consideration of the testimony and the evidence.

The record shows that three of the strikers in question were fined $100 each by the Common Pleas Court of Butler County, Ohio, on October 11, 1960, for contempt of Court in threatening, assaulting and subjecting to physical violence employees of the Company, and one of them was found guilty by a jury of assault and battery and fined $100 on November 28, 1960.

Under the provisions of § 10(b) of the Act, 29 U. S. C. § 160(b): "Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." Under § 3(d), 29 U. S. C. § 153 (d), which was enacted subsequently, "The General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board."

There can be no doubt that the General Counsel himself could have stricken the four names from the motion to amend the complaint before submitting it, since he had the power to refuse to issue a complaint initially. *N.L.R.B.* v. *Fred P. Weissman Co.*, 170 F.2d 952, 954 (C. A. 6), cert. denied, 336 U. S. 972; *Anthony* v. *N.L.R.B.*, 204 F.2d 832, 833 (C. A. 6). The Union argues that he had no right to reverse the procedure and do what otherwise amounted to

the same thing, by first offering the motion and then moving to strike the four names.

The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants. When, in the prosecution of a complaint, facts come to his knowledge showing that there was insufficient basis for proceeding thereon, it was his duty to make a motion to amend. *International Union of Electrical Workers* v. *N.L.R.B.*, 289 F.2d 757, 760 (C. A. D. C.); *American Newspaper Publishers Ass'n* v. *N.L.R.B.*, 193 F.2d 782 (C. A. 7), cert. den., 344 U. S. 812.

We hold that the General Counsel gave a valid reason for striking the names of the four strikers and that the Trial Examiner properly granted the General Counsel's motion. Failure to hear evidence concerning the alleged misconduct of these four strikers did not constitute an abuse of discretion. We reemphasize that, even if their names had not been stricken, and even if they had been found not to have been guilty of misconduct, these four strikers would not have been entitled to reinstatement because they had been permanently replaced prior to December 28, 1960.

(j) Finally the Company contends that the Board erred in ordering it to continue to bargain with the Union after the certification year had expired and it had become doubtful whether the Union still represented a majority of the employees. The original election vote was only 122 to 112 for the Union. In light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the Union's majority status. *Jackson Mfg. Co.*, 129 N.L.R.B. 460; *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196. Since the Company had well-founded doubts about the Union's majority status, it could have refused to bargain at the expiration of one year after the

Union's certification. *Brooks* v. *N.L.R.B.*, 348 U. S. 96; *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, 289 F.2d 713 (C. A. 2); *N.L.R.B.* v. *Minute Maid Corp*, 283 F.2d 705 (C. A. 5); *Celanese Corp. of America*, 95 N.L.R.B. 664; *Stoner Rubber Co.*, 123 N.L.R.B. 1440. This assumes, as was true in this case, that the Company did not commit an unfair labor practice which was responsible for the Union's loss of majority. *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, supra; *N.L.R.B.* v. *Florida Citrus Canners Cooperative*, 288 F.2d 630, 638, rev. and reman., 369 U. S. 404, initial decision aff'd, 311 F.2d 541 (C. A. 5).

The General Counsel contends that because the Company was guilty of refusing to bargain in good faith during the last two and a half months of the certification year, the Board, in fashioning an appropriate remedy, could require the Company to continue bargaining. The Board asserts that this was a matter within its discretion, but does not contend that such a result is required by the *Brooks* case, *supra*, which held that the employer has a duty to bargain during the certification year notwithstanding the Union's loss of its majority status.

The Board's order, under the facts of this case, overlooks two practical and important facts. First, with the withdrawal of its superseniority proposal on August 10, 1961, the Company resumed good faith bargaining, meeting twice with the Union, without result, before the hearing in this case began on October 3, 1961. Secondly, we are faced with the Union's obvious loss of its majority status. A realistic view of the situation demonstrates the futility of requiring the Company to continue negotiations with this Union, *Perry Coal Co.* v. *N.L.R.B.*, 291 F.2d 126, 128 (C. A. 7), *N.L.R.B.* v. *Florida Citrus Canners Cooperative*, supra, unless and until the Union has been duly certified as bar-

gaining representative following a new election, *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, supra.

It is appropriate to note here a statement by Judge Friendly in the *Superior Fireproof Door* case: "Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself." 289 F.2d at 724.

In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union. This part of the order of the Board is set aside and enforcement of the Board's order in this respect is denied.

Petitioners have raised certain other points which we find not to be well taken.

Accordingly enforcement of the order of the Board is denied with respect to the alleged Section 8(a)(1) violations and insofar as the Company is directed to continue negotiations with the Union. In all other respects enforcement of the order is granted.

O'SULLIVAN, Acting Chief Judge, dissenting: I am unable to agree with my brothers' disposition of the Statute of Limitations questions involved. The statute, § 10(b) of the Act, Title 29 U. S. C. A. § 160(b) reads in part as follows:

> "*Provided* That no complaint shall issue *based upon any unfair labor practice* occurring more than six months prior to the filing of the charge with the Board . . ." (Emphasis supplied)

The Board's findings of an 8(a)3 violation—discrimination in regard to hire—and an 8(a)5 violation—refusal

to bargain—Title 29, U. S. C. A. § 158(a)3 and 5, were both "based upon" conduct of respondent which occurred on December 28, 1960. As to the 8(a)5 violation, no charge was ever made "based upon" such conduct and as to the 8(a)3 violation, no charge "based upon" such conduct was filed within six months of December 28, 1960.

Relying on *NLRB* v. *Fant Milling Co.*, 360 U. S. 301, the Board found that some charges of unfair labor practice, made prior to the December 28, 1960 conduct permitted it to consider this latter conduct under the earlier charges. Therefore, it argued that such earlier charges tolled the running of the Statute of Limitations as to the 8(a)5 violation. I am unable to follow this reasoning. Neither *Fant* nor *National Licorice Co.* v. *NLRB*, 309 U. S. 350, also relied upon by the Board, had anything to do with the Statute of Limitations. *Fant* merely held that it was permissible for the Board, in passing upon a charge of unfair labor practices, to consider conduct occurring subsequent to the date of the orignial charge where the subsequent unfair labor practices are "related to those alleged in the charges" and "grow out of them while the proceeding is pending before the Board."

In the case at bar, the conduct described in the earlier charges was found not to amount to unfair labor practices. In *Fant*, the conduct described in the earlier charges was found to be illegal and that which occurred after the filing of the original charge was considered as merely a prolongation of the earlier illegal conduct. I cannot understand how charges made on September 23, October 20, and December 7, 1960, and found to be groundless can be used to toll the running of the statute against events which had not yet occurred and which were never made the subject of a charge of unfair labor practice. Considering that neither

Fant nor *National Licorice* dealt with a question of limitations, I cannot find them to be pertinent here.

As to the 8(a)3 violation, under which the Board ordered reinstatement of some 38 employees, the unfair labor practice that the complaint was "based upon" was the December 28, 1960 conduct of respondent causing "the bargaining negotiations to reach an impasse." Such conduct, so held the Board, converted what had been an economic strike into an unfair practice strike. The charge which sought the order for reinstatement under 8(a)3 was not made until September 23, 1961, some nine months after the unfair labor practice of December 28, 1960. My brothers hold that the statute did not begin to run on the 8(a)3 violation until August 3, 1961 when replaced employees were denied reinstatement. Any right to such reinstatement existed only because the unfair labor practice of December 28, 1960 converted the strike into an unfair labor practice strike as of that date. That was the conduct that the September 13, 1961 charge was "based upon." It was an "unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ," § 10(b).

The Board and my brothers follow the case of *NLRB* v. *Brown and Root, Inc.*, 203 F. (2d) 139, 146 (CA 8, 1953). While it contains some facts different from the case before us, I recognize the *Brown and Root* case as contrary to my view. I respectfully disagree with its holding. I prefer the reasoning of *Greenville Cotton Oil Co.*, 92 NLRB 1033, affirmed *sub. nom. American Federation of Grain Millers* v. *NLRB*, 197 F. (2d) 451 (CA 5, 1952). In our case there was nothing to prevent the employees' union, which was quite active in this regard during the strike, to have made a timely charge that respondent's December 28, 1960 con-

duct was an unfair labor practice. Such charge would have tolled the statute and would permit a complaint "based upon" it to be issued should respondents thereafter deny reinstatement to strikers replaced after the strike had become an unfair labor practice strike. The majority holding would expose an employer to the sanctions imposed for unfair labor practice no matter how long after their occurrence the offended employees wait to make a charge and seek a remedy. I believe that the language of the United States Supreme Court in *Machinists Local* v. *NLRB*, 362 U. S. 411 supports my view. The court there said:

> "[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso." 362 U. S. 422.

I would hold that any charge based on the December 28, 1960 unfair labor practice is barred by § 10(b) of the Act.

APPENDIX B

UNFAIR LABOR PRACTICES

SEC. 8. (a)

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership there-

in on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a)

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for

such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

APPENDIX C

SUPPLEMENTAL APPENDIX

EXCERPT FROM TRANSCRIPT OF TESTIMONY AT HEARING OF OCTOBER 3, 1961

MOTION BY MR. SWIGERT:

* * * * *

(10) Now, those charges were disposed of separately by the Regional Director. The Regional Director dismissed the proceedings in 9-CA-2192 on December 19, 1960 as being groundless. He dismissed the proceedings in 9-CA-2240 on January 12, 1960 as being groundless. Treated as separate proceedings.

EXCERPT FROM TRANSCRIPT OF TESTIMONY AT HEARING OF OCTOBER 11, 1961

Edward Fasold, having previously been sworn, was recalled to the stand and testified further as follows:

Direct Examination resumed by Mr. Swigert:

(1318) Q. Mr. Fasold, do you remember the union, Mr. Hyde, making a request of some kind at the beginning of the meeting on November 22nd? A. Yes, sir. That was a request for information regarding wages in the area of Miami plant which he claims that we used as a part of our—or used to determine our wage proposal.

PARAGRAPH 5(f) OF THE COMPLAINT AND ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

Issued July 28, 1961

(f) Its letter to the Union, on or about September 14, 1960, advising of the unilateral discontinuance of its share of the payments to the contributory insurance plan.